DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

DECISION ON ADMINISTRATIVE APPEAL IN RE:

Public Works Coverage Determination

2424 Arden Way, Sacramento, California

PUBLIC WORKS CASE NO. 91-037

I.

INTRODUCTION

On October 30, 1990, the Department of Industrial Relations (DIR) on a form provided by the Department of General Services (DGS), signed the agreement (DWC Lease) with Spieker-French-Davenport, a California General Partnership (Lessor) to lease real property located at 2424 Arden Way, for occupancy by the Division of Workers' Compensation (DWC).

On April 26, 1991, the Department of General Services, lessee, entered into another lease agreement (Divisions' Lease) for the occupancy of almost all of the remainder of the buildings at 2424 Arden Way by other DIR Divisions (DAS, OD Legal, DLSE, and DOSH). Both leases provided for tenant improvement work to be performed by the Lessor for DIR's occupancy. An inquiry from Ron E. Barrow, Public Relations Consultant to National Electrical Contractors Association (NECA) as to the public works status of the above projects led to a tentative Public Works determination for 2424 Arden Way. The determination found coverage for improvements constructed pursuant to both leases and requested

voluntary compliance by Spieker.

On August 19, 1991, the Lessor (Spieker Partners) filed an appeal from the Director's tentative determination requesting that no coverage be found for either of the two leases pursuant to Labor Code § 1720.2. A substantial portion of the appeal arguments turned on issues under submission before the California Supreme Court, and were disposed of February 24, 1992, in Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 4 Cal.Rptr.2d 837.

As described in the original coverage determination, the leases are slightly different. The DWC lease contains a Paragraph 22 which provides:

> Lessor shall cause to be paid to each workman employed in the performance of the construction, maintenance or service, including janitorial required by this lease whether employed directly by the Lessor or otherwise, the rate of wages generally prevailing for such workman's skills or trade in the area in which the lease premises are located.

The Divisions' Lease contains a second and additional paragraph spelling out the requirements of Labor Code § 1720.2 as follows:

> For those projects defined as Public Works pursuant to Labor Code § 1720.2, the following shall apply:
>
> A. Lessor/contractor shall comply with prevailing wage requirements and be subject to restrictions and penalties in accordance with § 1770 et seq. of the Labor Code which requires prevailing wages to be paid to appropriate work classifications in all bid specification and subcontracts.
>
> B. The lessor/contractor shall furnish all subcontractors/employees a copy of the Department of Industrial Relations prevailing wage rates which lessor will post at the job site. All prevailing wage rates shall be obtained by the lessor/contractor from:

Department of Industrial Relations
Division of Labor Statistics and Research
395 Oyster Point, Fifth Floor, Wing 4-C
South San Francisco, CA 94080

C. Lessor/contractor shall comply with the payroll record keeping and availability requirement of § 1776 of the Labor Code.

D. Lessor/contractor shall make travel subsistence payments to workers needed for performance of work in accordance with § 1773.8 of the Labor Code.

E. Prior to commencement of work, lessor/contractor shall contact the Division of Apprenticeship Standards and comply with §§ 1777.5, 1777.6, and 1777.7 of the Labor Code, and Title B, § 20 et seq. of the Administrative Code.

II.

CHALLENGES TO FINDINGS THAT "MORE THAN 50% OF THE ASSIGNABLE SQUARE FEET OF THE PROPERTY [SUBJECT TO THE CONSTRUCTION CONTRACT] IS LEASED TO THE STATE...FOR ITS USE" UNDER LABOR CODE § 1720.2(b)

A. Assignable Square Feet as Measured in the Initial Determination.

The initial determination based its finding as to percentages of assignable square feet on only the area covered under each lease independently and found coverage independently under each lease. These measurements seemed appropriate based on subsidiary findings that the buildings were physically, economically, and functionally independent from one another in that they shared no common walls or common roofs. Under ***this*** method of measurement 100% of the assignable square feet of the buildings subject to the construction contract were occupied by DWC under that lease. The initial determination went on to state that even if the total square footage of the four large buildings subject to the first construction contract were considered, the

overall percentage dropped only to 75% because some of the space available was not covered by the first lease (although later included in the second lease). In looking at the second lease, the percentage of leased space was 100%, calculated by looking at just the assignable square feet in the buildings where the rehabilitation work was done pursuant to the second construction contract. However, if one looked to the total square footage in the buildings occupied pursuant to the second lease, then the percentage of assignable square feet occupied by the state becomes 90%. That is because these buildings contain two non-state tenants leasing space. Thus under each form of measurement, the 50% threshold was met.

B. Determination of Assignable Square feet on Appeal.

Lessor's assertions on appeal required the lease data to be reviewed again. The review revealed that before the first lease was signed there were hold over tenants[1] from the Department of Industrial Relations in about a quarter of the space available in the complex.[2] This fact was neither considered when the initial determination was made nor raised by Lessor in its appeal.

The Department must consider this fact in this determination because hold over tenants pursuant to a lease are accorded the same terms and conditions as if their lease were

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[1] Civil Code § 1945 states "If a lessee of real property in possession thereof after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not to exceed one month where the rent is payable monthly, nor in any case one year." Here, the Department held over on various leases and extensions, paid rent to the Lessor and Lessor accepted the rent. Lessor was also negotiating a new lease with DIR.

[2] In the end of May, 1991, the "hold over" tenants left the premises to allow construction. They went to other premises of lessor, on Glendale Lane. They returned to 2424 Arden in August 1991.

still in effect. The second lease brought the hold over tenants under it.

The presence of hold over tenants does not change the result, but raises the percentage of space occupied by the state at the time each lease was signed beyond that discussed in the tentative determination. The hold over DIR tenants occupied an area of approximately 13,411 square feet, amounting to 25.6% of the assignable space. The space added by the DWC lease, (which did not overlap with the "hold over" space), added assignable space so that the Department would occupy 36,659 square feet, or 70% of the total. The records of the Department of General Services, Office of Real Estate Development Services (OREDS), indicate that the state had begun negotiations for the second (Divisions') lease by the time the first lease (DWC) was signed.

The second (Divisions') lease was for 27,380 square feet, which amounts to 52.3% of that available. Within the 27,380 was the hold over square footage mentioned above (13,411 square feet). When the assignable square feet in the first and second leases are added together they total 50,676 square feet, or 96.7% of the square feet available. Thus, unless "assignable square feet" has some other legal meaning, so as to include parking lots, an issue discussed in III. 6. following, there is no measurement formula which does not produce leases for over 50% of the assignable square feet.

C. Conclusion of The Appeal on Measurement of "Assignable Square Feet."

The fact that the Department was already a hold over tenant simply raises the percentage of all the buildings' "assignable square

feet" (considered together), which was occupied by the state even further over the 50% threshold in Labor Code § 1720.2. This does not change the result. It only makes it unnecessary to chose between a "building by building" or "all buildings together" method of measuring "assignable square feet" so as to determine whether this project is a public work.

III.

LESSOR'S LEGAL ARGUMENTS

1. Lessor argues that the Department should cease and desist from any further consideration of this matter because of its inherent conflict of interest given the financial impact this determination may have on the Department.

The alleged conflict is institutional in nature and not personal. It is an odd allegation because DIR's interest in saving money would lead it to agree with Lessor.

Lessor cites no authority for this proposition, only urging that this matter be turned over to the Attorney General's office for decision. However, Labor Code § 1770 vests exclusive jurisdiction to the Director of Industrial Relations for the determination of the prevailing wage coverage questions, Lusardi, supra, at n.6; 8 CCR § 16001 and, therefore, turning the matter over to the Attorney General's office would be beyond his authority. Further, even if the conflict were a personal one itwould fall within the necessity exception to conflicts. (See Gov. Code § 87101.)

2. Lessor requests that the Director appoint a neutral and impartial decision maker before any final determination on the "quasi-Judicial" issues are made.

Lessor brings up a long standing issue in regard to prevailing wages, whether determination of prevailing wage coverage issues is quasi-judicial or quasi-legislative in nature. The Department's position is that these determinations are quasi-legislative in nature and, therefore, it is unnecessary for a judicial-type proceeding to be conducted, and there is no need to appoint an independent decision maker in these matters. See Lusardi, supra, at 993-994; Winzler and Kelly v. DIR (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 748.

Lessor cites Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 278 Cal.Rptr. 346, which has to do with discharge of a State employee pursuant to the automatic resignation statute found in the Government Code. Lessor argues that the due process considerations involved in discharging a state employee by statute for failure to report to work for five consecutive days is analogous to the decision by the Director to enforce prevailing wages by contract against the Lessor in this matter. Conceptually, Lessor is attempting to equate the contractual and property rights of Lessor with the rights of State employees so as to require an evidentiary hearing prior to deprivation. In fact, Coleman found no need for an evidentiary hearing where there was a statute requiring discharge for failure to report to work without a good cause. Unlike the "property right" of a permanent civil servant, Lessor has no right to avoid paying prevailing wages. The rights here are under a contract for construction where the workers have already received some pay and

may be due additional sums. There is no deprivation of a property interest as to the workers, but merely a pecuniary dispute between the Lessor and OREDS.

3. Lessor further argues that the Department has no authority to make public works determinations, and is acting in excess of its jurisdiction in this proceeding.

Lessor argues that the regulations beginning at 8 CCR § 16100 do not deal with the issue of decision making on questions of whether something is or is not of public works, but rather the determination of wage rates once the definitional question of coverage has been met. The California Supreme Court has held that the question of coverage is implicit in any wage determination, and the statutes beginning at Labor Code § 1770 vest in the Director of Industrial Relations broad authority to make general prevailing wage determinations. Lusardi, supra, at 988-989; 8 CCR § 16001, specifically authorizes the Director to make general coverage determinations. 8 CCR § 16100(a), stated "The Director shall establish and coordinate the administration of the State's prevailing wage law, including the determination of coverage issues..." Lessor's argument that this means only wage rate determinations has been rejected by the Supreme Court.

4. Lessor next argues that the Director's request for payroll records under Labor Code § 1776 is not authorized by statute, regulations, or by the provisions of the lease.

Lessor essentially deems the Department's request for payroll records to be an administrative subpoena and challenges the Department's authority on constitutional grounds, citing Craib v. Bulmash (1989) 49 Cal. 475, 261 Cal.Rptr. 686. This decision is distinguishable from the present facts. Craib, supra, deals with administrative subpoenas pursuant to Labor Code § 1174, not

Labor Code § 1776, which requires records be maintained as a requirement of a public works contract. Even if the case were analogous, the standard set out in Craib is easily met here. The "subpoenaed records need only be relevant to authorized regulatory purposes and described with reasonable specificity" (Id. at 483). Also, paragraph 22(c) of the second lease is an agreement to keep records and make them available.

Lessor's related argument in this regard is that the Department did not execute the leases and has no standing to request the records. This overlooks two points. First, with regard to the DWC lease, Barry Carmody, then-Chief Deputy Director, directed the execution of the lease on behalf of the Department of Industrial Relations by delegation from OREDS. As to the second lease, OREDS executed it as an agent on behalf of the Department of Industrial Relations by statute, and the Department is a real party in interest in any event.

5. Lessor next argues that the provisions of neither lease obligated Lessor to comply with the prevailing wage provisions of the Labor Code and are too ambiguous to be enforced.

Lessor makes several arguments which can be grouped around the common contention that the lease terms as to prevailing wage obligations are ambiguous. If ambiguity is established, Lessor argues that it follows that:

a. Because the clauses were drafted by the lessee they are unenforceable, since ambiguities are construed against a drafter; and

b. Ambiguities resulted in lack of notice to the contractor; and

c. The ambiguities led to Lessor contracting for a

lower price than it would have, justifying contract remedies of recision/reformation under the headings of estoppel or mutual mistake.

However, all of these turn on whether a fair reading of either clause would find ambiguities. The ambiguity argument is mostly directed toward the first lease with the single prevailing wage paragraph. Lessor's argument is that the clause does not simply say "this is a Public Work." Rather, it says that "the rate of wages generally prevailing for such workman's skills or trade in the area" must be paid, without a reference tying those terms to the Labor Code. Thus, Lessor contends that it was left to the developer/contractor to decide what was the "area" and what is "prevailing."

Lessor argues that the recitation of the language in the second (Divisions') lease is ambiguous because the first sentence of the additional paragraph states "For those projects defined as 'Public Works' pursuant to Labor Code § 1720.2, the following shall apply." The argument is that this phrase requires a condition-precedent, i.e., notice from Department of General Services that the job is "defined as 'Public Works.'" The initial determination does not discuss whether either version of Paragraph 22 is ambiguous because it concentrates on the *statutory* consequences of assignable square feet, not DIR's contract enforcement rights.

The problem with this argument is that there is *no* credible alternative reason for the clauses except to affix public works obligations to the contract with the state. If the clauses discussed by Lessor are not meant to reference the Labor Code and

incorporate the prevailing wage requirements by reference, what possible purpose do they serve? The clauses are rendered meaningless under Lessor's interpretation and are reduced to mere surplusage. In other words, the prevailing wage clause in each lease must be understood as part of the agreement between the parties or it would be left to the construction contractor to decide what the prevailing wage is in his or her own discretion. That, in turn creates no enforceable obligations to the state. A term which creates no obligations toward the one who wrote it is implausible.

In addition, Lusardi, supra, renders these arguments more interesting for their intricacy than their relevance. There is a statutory requirement to pay prevailing wages (see Lusardi, at 986-988), which cannot be avoided by arguments as to contractual ambiguity. To say the least, Lessor was on notice that prevailing wages may be required by the contract. In Lusardi, there was no clause in the contract which might have given the contractor notice and, in fact, the contractor was given specific assurances that the project was not a public work. Thus, if the statutory language was enough to compel the payment of prevailing wages in Lusardi, ambiguity of a contract term that attempts to alert the contractor of the requirement to pay prevailing wages will not suffice to prevent the imposition of liability. The ambiguity argument is difficult to credit, but since it is not necessary to dispose of the coverage issue, it can be raised with DLSE as to penalties.[3]

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[3] As pointed out in Lusardi Construction Co. v. Aubry, supra, the California Supreme Court also finds a contract basis for prevailing wages exists (at 998, fn. 3) but is not necessary for their enforcement.

6. Lessor next argues that Labor Code § 1720.2 does not apply to the lease as a matter of fact.

Lessor argues that the Department confuses the term "lease" with the term "license" because Lessor did not transfer a lease interest in the parking lot area to the State in either of the leases, but merely gave the tenants "a non-exclusive use" of the common areas (which includes parking). Lessor states that the issue is relevant because of a cancelled term of the lease which shows at one point the State was considering renting the parking lot so as to be able to assign parking spaces, but instead deleted the term. Lessor argues that since parking space was considered to be leasable at one point, it shows that it was a transferable interest from Lessor and, therefore, "assignable square feet" within the meaning of Labor Code § 1720.2. The argument goes that if any area within the lot was considered to be part of the original assignable square feet and the State chose only to take a license to use it, instead of leasing the space so as to assign parking spaces, then the State must consider parking areas in determining what "50% of assignable square feet" means.

Essentially, Lessor's first argument is one of statutory construction as to what counts as "assignable square feet." It argues that the Department has wrongly excluded the parking areas in determining what is the assignable square footage of the property. Second, it argues that the Department's declaration that the parking area space is not "assignable" is wrong because the Department confuses the term lease with the term license. These arguments fail for the reasons discussed below.

The first argument, the inclusion of the parking areas,

is a creative approach to a settled question. The term assignable square feet as used in Labor Code § 1720.2 has a standard industry meaning referring to usable space within a structure and not parking areas.[4] The map supplied to the Department during the investigation cites the 52,313 square feet as "usable and leasable s.f." while describing the rest of the property as "parking provided." (Attachment 2.)

As to the second argument, Lessor states that Paragraph 12 merely gives the State a license to use the parking areas and not a lease to do so on a pro-rated basis. This ignores the lease itself because the State's right to parking is actually addressed in Paragraph 1. Lessor is correct about the meaning of Paragraph 12, but that paragraph is superseded by Paragraph 1 which creates a "license coupled with an interest" in favor of the lessee. (See 4 Witkin, Summary of California Law (9th Ed. 1988) § 483, p. 660.) The terminology used in the initial determination may have been inappropriate, because while the State does have a pro-rated right to parking, this is not a lease interest but a license coupled with a lease interest.[5] But if the legal question is what measures the assignable square feet within a building, the potential to

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[4] The actual term used in both leases is "net usable square feet." Lessor plainly ignores the standard language in the industry and the standard state lease terms in making this argument. In standard industry parlance "assignable square feet," "net usable square feet," and "net leasable area" are essentially the same idea--usable inside space, less common areas. See terms 1a, 1b, and 1c--no definitions cover parking areas. The same is true as to OREDS' terms used in Attachments 1d, 1e, and 1f, the Manual and the planners guide used by OREDS in-house. However, neither the State documents nor the dictionaries mirror the terminology used by Labor Code § 1720.2--"assignable square feet of the property."

[5] Because the State is leasing in both leases significant parts of what is essentially a suburban office complex with approximately 270 parking spaces, guaranteed parking was not considered necessary. According to OREDS, that is the reason why the first clause of Paragraph 12 was stricken.

lease parking should have nothing to do with the answer. Including parking outside a structure as "assignable square feet" would create an odd exception to the public work laws depending on how much suburban mall parking surrounded the building into which the state moved.[6] No state agency would lease parking space which commonly observed real estate conventions bring along for free with a substantial leasehold.

7. Lessor next argues that Labor Code § 1720.2 does not apply to construction contracts for alterations to buildings, but only to contracts calling for construction of a new building.

The thrust of Lessor's argument is that the bill creating Labor Code § 1720.2 (AB 3235 by Assemblyman Dunlap) was meant only to cover construction of a completed building and not alterations. Section 1720.2 refers only to "any construction," whereas § 1720(a) said "construction, alteration, demolition, or repair work." Without an OAL-sanctioned regulation specifying that alteration is included in the term construction for purposes of § 1720.2, Lessor argues that the Department cannot now claim that alteration is included in § 1720.2 as "[A]ny construction work done under private contract."

Lessor relies on the bill analysis which refers to "Construction projects." Lessor also relies on two press releases and a hand-written response to a questionnaire from the Senate Committee on Industrial Relations to support this argument. None of these last three items can really be used to determine legislative history, and it does not appear that any of them

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[6] This exception would be known as the suburban mall exception. Lessor's argument also ignores the black letter law on appurtenances which may have required Spieker to provide parking even if it were not discussed in the lease, but plainly available around the building. (See 6 Miller & Starr, Current Law of California Real Estate (2d Ed. 1989), § 18:21, pp. 48-51.)

actually addressed the question which Lessor claims that they answer. They merely refer to construction projects generally, and do not define the term in any manner. The legislative history which Lessor has pressed is simply unpersuasive.

Although no cases define "any construction work," "[a]s one thinks of 'construction' one ordinarily considers the entire process, including construction of basements, foundations, utility connections and the like, all of which may be required in order to erect an above ground structure." Priest v. Housing Authority (1969) 275 Cal.App.2d 751, 756, 80 Cal.Rptr. 145, 149.[7] That same case notes that "alteration" in Labor Code § 1720 includes not only alteration of buildings but also of land itself by rooting up foundations, buried pipe, etc. Id. at 149. "Alteration" thus overlapped with "demolition."

The term "any construction work" in § 1720.2 is broader than just "construction" in Labor Code § 1720. One reason that "alteration, demolition and repair" are absent from § 1720.2 is because public entities rarely require demolition, or alteration of a bare land site (as in Priest), preparatory to leasing an office. The statute inferentially supports this explanation because it uses the term "assignable square feet." This term contemplates measurement of build-up or rehabilitated space within a structure. See n.3, supra. Leases of bare land--such as would

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[7] Here, the operative word is "any" as it modifies the phrase "construction work." Webster's New Collegiate Dictionary defines "any" as: "all, every, the maximum or whole of something." Reliance upon the dictionary meaning of words is an acceptable method of statutory construction. Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 745, 751. In the absence of any compelling countervailing consideration, none of which has been shown herein, courts (and by extension, administrative agencies) must assume that the Legislature says what it means and means what is says. Tracy v. Municipal Court (1978) 22 Cal.3d 760; People v. Rodriguez (1963) 222 Cal.App.2d 221.

be made ready by the "demolition" or "alteration" described in Priest--are normally measured by the acre.

Priest, supra, is the only case on the definitional section of Labor Code § 1720, and its discussion of "alteration" supports the view that there can be overlap among the terms used in § 1720(a). The case held that the leveling of housing and digging up of pipes was covered by § 1720's term "demolition" and went on to say that alteration could be of either buildings or ground itself. If "alteration" and "demolition" can overlap in § 1720(a), then "any construction work" in § 1720.2 might describe some of the same work on buildings as "alteration" in § 1720(a).

The distinction advanced by the Lessor makes little sense given the overall purposes of prevailing wages. Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 985, 987, 4 Cal.Rptr.2d 837. A "gut rehabilitation" job extending over several months like 2424 Arden Way uses construction labor, and has an effect on the local labor market, as much as building from the ground up. It has far more effect on labor rates than the lesser activities of "repair" (covered by Lab. Code § 1720(a)) or mere construction-type "maintenance" (covered by Lab. Code § 1771). The rehabilitation work here moved tenants out of every building, entailed moving walls, replacing or repairing ceilings, moving, adding or eliminating doorways, remodeling the bathrooms for handicapped access and use by a larger number of people than originally anticipated, rewiring and expanding the electrical

wiring to allow high-load use of computers, fax machines and other office equipment; building protective counters, with security glass for some state tenants, repainting (inside and out) and carpeting certain floors.[8]

IV.

CONCLUSION

For the foregoing reasons, Lessor's and contractor's joint appeal that the Department reverse its prior determination is denied.

DATED: 4/20/92

LLOYD W. AUBRY, JR.
Director of the Department
of Industrial Relations

(clumachd-pw"2424 ARDEN/APL-17")

[8] See Lab. Code §§ 1720(d) and (f).